

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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ASSUNTA FUSCO MINTZ, et al.,

Plaintiffs,

– against –

MARKETING COHORTS, LLC, et al.,

Defendants.  
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ORDER  
18-CV-4159 (JFB)(SIL)

FILED  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.

★ APR 17 2019 ★

LONG ISLAND OFFICE

JOSEPH F. BIANCO, District Judge:

On February 21, 2019, Magistrate Judge Locke issued a Report and Recommendation (the “R&R,” ECF No. 44) recommending that the Court (1) dismiss defendants’ counterclaims with prejudice for failure to prosecute pursuant to Federal Rule of Civil Procedure 41; (2) grant plaintiffs leave to move to both strike the answer pursuant to Federal Rules of Civil Procedure 37 and 16, and renew their motion for default judgment. The R&R was served on defendants on February 22, 2019. (ECF No. 45.) The R&R instructed that any objections to the R&R be submitted within fourteen (14) days of service of the R&R, with additional time provided for mail service, *i.e.*, by March 15, 2019. (R&R at 10-11.) The date for filing any objections has thus expired, and defendants have not filed any objection to the R&R. For the reasons set forth below, the Court adopts the thorough and well-reasoned R&R in its entirety, dismisses defendants’ counterclaims with prejudice, and grants plaintiffs leave to move to strike the answer and renew their motion for default judgment.

Where there are no objections to a report and recommendation issued by a magistrate judge, the Court may adopt the report and recommendation without *de novo* review. *See Thomas*

*v. Arn*, 474 U.S. 140, 150 (1985) (“It does not appear that Congress intended to require district court review of a magistrate’s factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings.”); *see also Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) (“Where parties receive clear notice of the consequences, failure timely to object to a magistrate’s report and recommendation operates as a waiver of further judicial review of the magistrate’s decision.”); *cf.* 28 U.S.C. § 636(b)(1)(c) *and* Fed. R. Civ. P. 72(b)(3) (requiring *de novo* review after objections). However, because the failure to file timely objections is not jurisdictional, a district judge may still excuse the failure to object in a timely manner and exercise its discretion to decide the case on the merits to, for example, prevent plain error. *See Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003) (“[B]ecause the waiver rule is non jurisdictional, we ‘may excuse the default in the interests of justice.’” (quoting *Thomas*, 474 U.S. at 155)).

Although the parties have waived any objection to the R&R and thus *de novo* review is not required, the Court has conducted a *de novo* review of the R&R in an abundance of caution. Having conducted a review of the Complaint, the motion papers, and the applicable law, and having reviewed the R&R *de novo*, the Court adopts the findings and recommendations contained in the R&R in their entirety. Accordingly,

IT IS HEREBY ORDERED that defendants’ counterclaims (ECF No. 28) are dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41.

IT IS FURTHER ORDERED that plaintiffs are granted leave to move to strike the answer and renew their motion for default judgment.

The Court has received plaintiffs’ motion to dismiss counterclaims, strike defendants’ answer, and for default judgment filed March 27, 2019. (ECF No. 49.) As discussed, this order

grants the motion to dismiss defendants' counterclaims. IT IS FURTHER ORDERED that defendants shall submit any opposition to plaintiffs' motion to strike defendants' answer and for default judgment on or before May 15, 2019; plaintiffs shall submit any reply thereto on or before May 30, 2019.

IT IS FURTHER ORDERED that plaintiffs serve a copy of this Order on defendants.

SO ORDERED. 

S/ JOSEPH F BIANCO

  
JOSEPH F. BIANCO  
UNITED STATES DISTRICT JUDGE

Dated: April 17, 2019  
Central Islip, New York